

# FEDERAL COURT OF AUSTRALIA

## **Singh v Minister for Immigration and Border Protection [2017] FCA 475**

Appeal from: *Singh v Minister for Immigration and Border Protection*  
[2016] FCCA 1400

File number: VID 719 of 2016

Judge: **KENNY J**

Date of judgment: 10 May 2017

Catchwords: **MIGRATION** – application for a skilled visa – where Tribunal found that appellant did not meet Public Interest Criterion 4020 – where appellant did not appear at Tribunal hearing – whether appellant denied procedural fairness – whether bogus document findings were open to the Tribunal – effect of failure to define “recognised countries” in Ministerial instrument and thereby indicate the relevant assessing authority – appeal dismissed

**PRACTICE AND PROCEDURE** – where grounds of appeal were not raised in the Court below – whether leave should be granted – leave refused

Legislation: *Migration Act 1958* (Cth)

*Migration Regulations 1994* (Cth)

*Migration Amendment Regulations 2011 (No 1)* (Cth)

Cases cited: *Arora v Minister for Immigration and Border Protection*  
[2016] FCAFC 35; 238 FCR 153

*Batra v Minister for Immigration and Citizenship* [2012]  
FMCA 544; 265 FLR 461

*Batra v Minister for Immigration and Citizenship* [2013]  
FCA 274; 212 FCR 84

*Kaur v Minister for Immigration and Border Protection*  
[2014] FCA 1276

*Minister for Immigration and Border Protection v Sandhu*  
[2016] FCA 130

*Mudiyanselage v Minister for Immigration and Citizenship*  
[2013] FCA 266; 211 FCR 27

*Nanre v Minister for Immigration and Border Protection*  
[2015] FCA 528; 232 FCR 80

*Sharma v Minister for Immigration* [2014] FCCA 2821;  
291 FLR 289

*Sharma v Minister for Immigration and Border Protection*  
[2015] FCCA 2669

*Singh v Minister for Immigration* [2012] FMCA 145

*Sun v Minister for Immigration and Border Protection*  
[2016] FCAFC 52; 243 FCR 220

*Trivedi v Minister for Immigration and Border Protection*  
[2014] FCAFC 42; 220 FCR 169

*VUAX v Minister for Immigration and Multicultural and  
Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588

|                                    |                                                                |
|------------------------------------|----------------------------------------------------------------|
| Date of hearing:                   | 21 March 2017                                                  |
| Registry:                          | Victoria                                                       |
| Division:                          | General Division                                               |
| National Practice Area:            | Administrative and Constitutional Law and Human Rights         |
| Category:                          | Catchwords                                                     |
| Number of paragraphs:              | 94                                                             |
| Counsel for the Appellant:         | The Appellant appeared in person                               |
| Counsel for the First Respondent:  | T Smyth                                                        |
| Solicitor for First Respondent:    | Australian Government Solicitor                                |
| Counsel for the Second Respondent: | The Second Respondent submitted to any order, save as to costs |

## **ORDERS**

**VID 719 of 2016**

**BETWEEN:**            **RAVINDER SINGH**  
                         **Appellant**

**AND:**                **MINISTER FOR IMMIGRATION AND BORDER**  
                         **PROTECTION**  
                         **First Respondent**

**ADMINISTRATIVE APPEALS TRIBUNAL**  
**Second Respondent**

**JUDGE:**            **KENNY J**

**DATE OF ORDER:**    **10 MAY 2017**

### **THE COURT ORDERS THAT:**

1.     1.     Leave to rely on grounds 1 to 8 of the notice of appeal be refused.
2.     2.     The appeal be dismissed.
3.     3.     Unless the appellant notifies the Court in writing by 4.00 pm on 12 May 2017 that he opposes the amount of costs to be fixed, the appellant pay the first respondent's costs of the proceeding in this Court fixed in the sum of \$3,200.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

**KENNY J:**

### Introduction

1        This is an appeal from a judgment of the Federal Circuit Court of Australia (**FCCA**) delivered on 9 June 2016. The FCCA dismissed Mr Singh’s application for judicial review of a decision of the Migration Review Tribunal (now the Administrative Appeals Tribunal) (**the Tribunal**) made on 12 February 2015 affirming a decision made by a delegate of the respondent Minister to refuse Mr Singh a Skilled (Provisional) (Class VC) (subclass 485) visa (**the visa**): see *Singh v Minister for Immigration and Border Protection* [2016] FCCA 1400.

2        On the application of the appellant, Mr Ravinder Singh, the hearing was adjourned on 30 January 2017, to enable him to seek legal advice. Ultimately, however, Mr Singh represented himself at the subsequent hearing of the appeal.

3        For the reasons stated below, I would refuse leave to rely on grounds 1 to 8 of the notice of appeal and dismiss the appeal.

### Summary of background facts

4        The appellant, who is a citizen of India, made an online application for the visa on 19 April 2009. In this application, he nominated his occupation as “Motor Mechanic”. He indicated that his skills had been assessed for that occupation by Trades Recognition Australia (**TRA**) on 29 July 2008. His visa application also stated that he had worked as a Motor Mechanic between 12 March 2007 and 27 April 2008 at Coburg Automatic Transmissions (**Coburg Automatic**). On 20 May 2009, he provided the Department of Immigration and Border Protection with a copy of a letter dated 29 July 2008, in which the TRA advised him that “[f]or the purposes of the skills assessment component of the migration process” he had been successfully assessed for the occupation of “Motor Mechanic” (**skills assessment**). When Mr Singh applied to TRA for the skills assessment, he provided a work reference letter from the owner of Coburg Automatic dated 3 July 2008, in which the owner stated that he had “more than 900 hours of unpaid work experience” in his business (**work reference letter**). Mr Singh also provided a copy the work reference letter to the Department.

On 16 July 2010, the Department wrote to the appellant and invited him to comment on information gathered from a Departmental investigation into false work reference letters. This information indicated that the documents on which the appellant relied to support his application for the visa were false or misleading. The appellant did not respond to the invitation.

On 4 January 2012, the Department wrote to the appellant again, inviting him to comment on information that suggested he had provided fraudulent information in support of his application for the visa. Specifically, the letter explained that a person had pleaded guilty to the manufacture and sale of work experience records matching the reference letter that the appellant had provided with his visa application. The letter also attached a copy of Public Interest Criterion 4020 (**PIC 4020**).

PIC 4020 is the public interest criterion which the appellant had to satisfy in order to be granted the visa. At the relevant time, PIC 4020 relevantly provided as follows:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
  - (a) the application for the visa; or
  - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
  - (a) starting 3 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse the application;the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

...
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
  - (a) compelling circumstances that affect the interests of Australia; or
  - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;justify the granting of the visa.
- (5) In this clause:

**information that is false or misleading in a material particular** means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Note: Regulation 1.03 defines **bogus document** as having the same meaning as in section 97 of the Act.

8        8        Section 97 of the *Migration Act 1958* (Cth) (the ***Migration Act***) relevantly provided:

**bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

9        9        On 21 March 2012, the appellant emailed the Department a statutory declaration in which he declared that he had “genuinely attained 900 hours of experience from [Coburg Automatic]”.

10       10       On 10 August 2012, the Department sent a third invitation to comment to the appellant. Among other things, the invitation attached various documents, including a written statement made by the owner of Coburg Automatic to the Australian Federal Police, which indicated that the appellant had not in fact worked at Coburg Automatic.

11       11       On 6 September 2012, the appellant provided a further statutory declaration to the Department, stating that he had worked at Coburg Automatic from 12 March 2007 to 27 April 2008.

12       12       On 21 September 2012, a delegate of the Minister refused to grant the visa because the appellant did not satisfy the requirements of cl 485.224 of Sch 2 to the *Migration Regulations 1994* (Cth) (the ***Regulations***). Clause 485.224 required the appellant to satisfy the requirements of PIC 4020, which, in the delegate’s view, he did not.

13       13       On 10 October 2012, the appellant applied to the Tribunal for review of the delegate's decision.

14        14        On 5 June 2014, as the Tribunal’s reasons for decision indicate, the Tribunal wrote to the appellant pursuant to s 359A of the *Migration Act*, inviting him to comment on information that his work reference letter was fraudulently obtained and provided to TRA by the appellant or on his behalf, which the Tribunal considered would be part of the reason for affirming the decision under review. A suppression order made by the County Court of Victoria was also attached to the Tribunal’s letter. On 25 July 2014, after granting the appellant an extension of time to respond, the Tribunal received a response from the appellant reiterating that he had genuinely completed work experience at Coburg Automatic. He stated that he would explain the details at a hearing.

15        15        On 10 November 2014, the Tribunal invited the appellant to a hearing before it on 15 December 2014. On 8 and 12 December 2014, the Tribunal sent the appellant reminders by text message of the scheduled time and date of the hearing. On 12 December 2014, the appellant emailed the Tribunal, stating that:

I am writing you [sic] in regards to my MRT application. I am sending you the statement in support of my application as an attachment.

I request you to please consider my statement before making any decision on my application ...

In the statement attached to the email the appellant again indicated that he had genuinely completed work experience at Coburg Automatic.

16        16        The appellant did not attend the scheduled hearing before the Tribunal.

17        17        On 15 December 2014, after the scheduled hearing time, the appellant wrote to the Tribunal attaching the decision of the FCCA in *Sharma v Minister for Immigration and Border Protection & Anor* [2014] FCCA 2821; 291 FLR 289 (***Sharma v Minister [2014] FCCA 2821***) and requesting that the Tribunal “go through” it. In that case, the Court considered whether a work reference letter, which was provided to TRA prior to TRA being validly specified as a “relevant assessing authority”, contravened PIC 4020. In that case, the Court held that the provision of the work reference letter did not contravene PIC 4020.

18        18        On 22 December 2014, the Tribunal again wrote to the appellant pursuant to s 359A regarding information from Departmental investigations into fraudulent work references. The letter stated that, if the Tribunal did not receive a response before 19 January 2015, the

Tribunal might make a decision without taking any further action to obtain the appellant's views. The appellant did not respond to that invitation.

On 12 February 2015, the Tribunal affirmed the delegate's decision.

### **Relevant legislative framework**

Under the *Migration Act*, the Minister may grant a non-citizen a visa to remain in Australia (s 29). The *Migration Act* provides for classes of visas. It also authorises regulations prescribing the criteria for a visa or visas of a specified class (s 31). A non-citizen who wants a visa must apply for a visa of a particular class (s 45).

The *Regulations* make provision for Skilled (Provisional) (Class VC) visas: see Sch 1, cl 1229. There are two subclasses of this visa class, expressed in cl 485 and 487 of Sch 2 to the *Regulations*. Mr Singh applied for a subclass 485 visa.

Three conditions for this visa are presently relevant. The first is PIC 4020, to which reference has already been made.

At the time of Mr Singh's application for the visa, the criteria for the grant of a subclass 485 visa did not include a requirement to meet PIC 4020. This requirement was introduced by the *Migration Amendment Regulations 2011 (No 1)* (Cth) (the ***Amending Regulations***): see Sch 3, Items 3 and 4 of the *Amending Regulations*; see also *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1276 at [29]-[32], [52] (Barker J). The effect of the amendments was that cl 485.224 required Mr Singh to satisfy PIC 4020 (set out above) at the time of the Tribunal's decision. This was because the amendments in Sch 3 of the *Amending Regulations* applied to an application for a visa "made, but not finally determined" before 2 April 2011: see reg 5(2) and Sch 3 of the *Amending Regulations*. The *Amending Regulations* commenced on the day for which it provided, namely 2 April 2011: see reg 2 of the *Amending Regulations* and s 12(1)(b) of the *Legislation Act 2003* (Cth). As noted, Mr Singh's application had been made on 19 April 2009 but had not been determined as at 2 April 2011.

In order to satisfy PIC 4020(1), there must be no evidence before the Minister that the visa applicant has given, or caused to be given, a bogus document "to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth" in relation to the application for the visa. The Minister has discretion under PIC 4020(4) to waive the requirement in PIC 4020(1) in specified circumstances, but he did



not do so in Mr Singh's case. As noted above, s 97 defined "a bogus document, in relation to a person" as a document that the Minister reasonably suspects is a document that (amongst other things) "was obtained because of a false or misleading statement, whether or not made knowingly".

25      25      Secondly, there is the time of application criterion in cl 485.214, which required that:

The Minister is satisfied that the applicant has applied for an assessment of the applicant's skills for the nominated skilled occupation by a relevant assessing authority.

26      26      Thirdly, there is the time of decision criterion in cl 485.221(1), which required that:

The skills of the applicant for the applicant's nominated skilled occupation have been assessed by the relevant assessing authority as suitable for that occupation.

27      27      The term "relevant assessing authority" in each of these criteria derives meaning from reg 2.26B(1) of the *Regulations*, which states:

Subject to subregulation (1A), the Minister may, by an instrument in writing for this subregulation, specify a person or body as the relevant assessing authority for:

- (a) a skilled occupation; and
- (b) one or more countries;

for the purposes of an application for a skills assessment made by a resident of one of those countries.

28      28      Relevantly here, the Minister sought to exercise the power conferred by reg 2.26B(1) to make the instrument that is known as IMMI 12/068. This instrument was expressed to commence on 1 July 2012 and was on its face applicable to Mr Singh's visa application: see IMMI 12/068, cll 2(iii) and (iv). These clauses stated that:

- (iii) for the purposes of paragraph 2.26B(1)(a) of the *Regulations*, the person or body corresponding to each skilled occupation listed in Schedule 1A to this instrument as the relevant assessing authority for that skilled occupation; and
- (iv) for the purposes of paragraph 2.26B(1)(b) of the *Regulations*, the country or countries corresponding to each skilled occupation and relevant assessing authority listed in Schedule 1A to this instrument as the country or countries for which the specified person or body is the relevant assessing authority for the purposes of an application for a skills assessment in that skilled occupation made by a resident of one of those countries...

29      29      Mr Singh's specified skilled occupation was "Motor Mechanic", to which the following part of Sch 1A applied:

| OCCUPATION     | ASCO CODE | COUNTRY                         | ASSESSING AUTHORITY | POINTS |
|----------------|-----------|---------------------------------|---------------------|--------|
| Motor Mechanic | 4211-11   | All except recognised countries | TRA/VETASSES        | 60     |
| Motor Mechanic | 4211-11   | Recognised countries            | VETASSESS           | 60     |

30 30 IMMI 12/068 does not, however, define the term “recognised countries”. The failure is evident when regard is had to the instrument itself and is confirmed by the history of IMMI 12/068 and its predecessor instruments. There is, moreover, no relevant definition of “recognised countries” in the *Migration Act* or regulations under that Act.

31 31 IMMI 07/058 was the first in this series of instruments to use the term “recognised countries”. IMMI 07/058 was expressed to be effective from 1 September 2007. In that instrument, the phrase “recognised countries” took its meaning from Sch 2, listing those countries as India, the Philippines, South Africa, Sri Lanka and the United Kingdom. The category and its definition were carried over to:

- (1) (a) IMMI 08/004, which revoked IMMI 07/058 and was expressed to be effective from 26 April 2008;
- (2) (b) IMMI 09/031, which revoked IMMI 08/004 and was expressed to be effective from 15 May 2009; and
- (3) (c) IMMI 10/026, which revoked IMMI 09/031 and was expressed to be effective from 1 July 2010 (though the definition was relocated from Sch 2 to Sch 4).

32 32 The definition was omitted in the next instrument. When IMMI 10/079 revoked IMMI 10/026 with effect from 5 December 2010, the “recognised countries” category continued to attach to various occupational classes, but the definition disappeared. The Minister accepted that the omission of the definition was “the consequence of draftsperson error”. This error persisted in:

- (4) (a) IMMI 11/034, which revoked IMMI 10/079 and was expressed to be effective from 1 July 2011;
- (5) (b) IMMI 11/068, which revoked IMMI 11/034 and was expressed to be effective from 1 October 2011; and

- (6) (c) IMMI 12/068, which revoked IMMI 11/068 and was expressed to be effective from 1 July 2012, which was effective in Mr Singh's case and, so the Minister stated, remains in force.

33 33 It may be noted that this is not the first time that a deficiency of this kind has been discerned in the regulatory regime under consideration. As the Minister noted in written submissions, the TRA was not validly specified as a relevant assessing authority at all between 1 July 2007 and 1 October 2011, because there was no compliance with reg 2.26B(1A) (requiring written Ministerial approval by the Minister for Education or the Employment Minister of a person or body as the relevant assessing authority for the occupation).

### **Tribunal decision**

34 34 Mr Singh did not attend the scheduled hearing before the Tribunal on 15 December 2014 and, in the circumstances set out above, the Tribunal proceeded to make a decision on the review under s 362B of the *Migration Act*, discussed further below.

35 35 The issue before the Tribunal was whether Mr Singh satisfied PIC 4020 as required by cl 485.224 in Sch 2 of the *Regulations*. The Tribunal noted that:

[T]he department's case is that the skills assessment for Mr Singh dated 29 July 2008 by Trades Recognition Australia ... provided to the department by Mr Singh on 20 May 2009 in support of his visa application, was a bogus document as defined in s. 97 of the Act. The department delegate noted that the skills assessment by the TRA was based on documents supplied to the TRA, including documents supporting that Mr Singh had 900 hours' work experience at Coburg Automatic Transmissions. The delegate noted that investigations of Mr Amarante indicate that Mr Singh did not complete work experience at Coburg Automatic Transmissions as claimed in the work reference document provided to the TRA. The delegate relied on the criminal investigation and proceedings against Mr Carmine Amarante and that on 4 November 2011 Mr Amarante pleaded guilty to the manufacture and sale of work references matching the one submitted to TRA to obtain Mr Singh's skills assessment. The delegate noted that Mr Amarante admitted the documents were fraudulent in content and that they were created to assist Mr Singh to apply for permanent residence in Australia. The delegate also referred to other documents which were provided to the Tribunal, including a statement by the employer at Coburg Automatic ... and evidence obtained under a warrant and the agreed summary of facts in the criminal prosecution.

36 36 The Tribunal gave a detailed description of Mr Singh's response to the Department's claims before setting out the following findings, "based on the documents submitted by the applicant to the Department during the visa application process and the documents provided to the Tribunal during the review process":

- - On 19 April 2009 Mr Singh lodged an application for a Skilled (Provisional) (Class VC)(sub class485) visa with the Department. The visa application included the details of a skills assessment undertaken by [TRA] on 29 July 2008 ... for the nominated occupation of motor mechanic.
- - On 20 May 2009 Mr Singh provided to the Department a copy of his skills assessment dated 29 July 2008 issued by TRA ... for Mr Singh for the position of motor mechanic 4211-111.
- - Mr Singh applied to TRA for the skills assessment and in support of his application he provided to the TRA a 4 page letter dated 3 July 2008 on Coburg Automatic Transmissions letterhead signed in the name of [the] Owner/head mechanic ... and photographs of Mr Singh at Coburg Automatic Transmissions. Mr Singh also provided a copy of this work reference dated 3 July 2008 to the Department.
- - The work reference states, in part, as follows – “this reference letter is for Mr Ravinder Singh ... who worked with us as an Assistant Motor Mechanic from 12/3/2007 to 27/04/2008. ... He has got more than 900 hours of unpaid work experience as an Assistant Motor Mechanic”.

37      37      The Tribunal identified the “central evidentiary issue” as “whether the Tribunal reasonably suspects that the TRA assessment is a document that was obtained because of false or misleading statements regarding Mr Singh working at Coburg Automatic Transmissions from 12 March 2007 to 27 April 2008 and that Mr Singh worked more than 900 hours of unpaid work experience as an assistant motor mechanic at Coburg Automatic Transmissions as set out in the work reference”. The Tribunal focussed on the material obtained from the Departmental investigation and on which the delegate relied in refusing to grant the visa, which included statements by Mr Amarante and the owner of Coburg Automatic that supported the Department’s position (see [35] above).

38      38      On the basis of the material before it, the Tribunal found that statements in Mr Singh’s work reference from the owner of Coburg Automatic “regarding Mr Singh working at [Coburg Automatic] and the hours that Mr Singh worked at [Coburg Automatic] were false or misleading”. The Tribunal stated that, in reaching this conclusion, it “placed greater weight on the information from the criminal investigation – in particular the statements of [the owner] that he did not employ anyone and that he did not employ Mr Singh and that he did not write the work reference”. The Tribunal accepted that “Mr Amarante did enter into an arrangement with [the owner of Coburg Automatic] to manufacture and sell work references and that one of the false work references was for Mr Singh”.

39      39      In the circumstances, the Tribunal held that it reasonably suspected that the skills assessment issued by TRA on 29 July 2008 in respect of Mr Singh was obtained “because of a false or misleading statement in the work reference for Mr Singh”. On this basis, the

Tribunal found that the skills assessment was a “bogus document” as defined in s 97(c) of the *Migration Act*. The Tribunal found, on 20 May 2009, Mr Singh caused the bogus document to be given to an officer in relation to his application for the visa.

40        The Tribunal considered *Sharma v Minister* [2014] FCCA 2821 and contrasted it with the decisions in *Batra v Minister for Immigration and Citizenship* [2012] FMCA 544; 265 FLR 461 (*Batra FMC*) (affirmed in *Batra v Minister for Immigration and Citizenship* [2013] FCA 274; 212 FCR 84 (*Batra FCA*)) and *Mudiyanselage v Minister for Immigration and Citizenship* [2013] FCA 266; 211 FCR 27 (*Mudiyanselage*) where it was held that it was immaterial that TRA was not specified as a “relevant assessing authority” at the relevant time.

41        The Tribunal concluded that it was not satisfied that there was no evidence that Mr Singh had given or caused to be given to the Minister, a Departmental officer, the Tribunal or a relevant assessing authority a bogus document in relation to his application for the visa. It held that Mr Singh did not satisfy PIC 4020, for the purposes of cl 485.224. It was not satisfied that the requirement should be waived. Noting that the other subclasses relevant to the visa also required that the appellant satisfy PIC 4020, the Tribunal affirmed the decision not to grant Mr Singh the visa.

### **Proceedings in the FCCA**

42        On 6 March 2015, Mr Singh applied for judicial review of the Tribunal's decision. In his application, Mr Singh stated that he was “not satisfied” with the Tribunal’s decision. He also stated that he had requested additional time to provide documents, which request was refused by the Tribunal.

43        On 9 June 2016, the primary judge dismissed Mr Singh’s judicial review application, with costs. Her Honour held that the application was “without merit” (at [21]); and there was “nothing on the Tribunal's file nor before the Tribunal or Court to indicate that [Mr Singh] requested an extension of time from the Tribunal for the purposes of providing further material” (at [22]). The primary judge also found that Mr Singh was given “ample opportunity to provide evidence and further evidence to the Tribunal and, indeed, did provide further evidence on more than one occasion” (at [22]).

44        The primary judge held that the Tribunal's findings were open to it on the material and evidence before it and that there were no arguable grounds of review put to the Court (at [23]). Her Honour also found that the Tribunal's discretion to make a determination on the

papers had been enlivened and that, “[g]iven the totality of actions undertaken by the Tribunal”, it had appropriately exercised that discretion (at [25]).

### Grounds of appeal

The grounds of appeal stated in Mr Singh’s notice of appeal filed in this Court were as follows:

1. The Judge failed to consider that the Tribunal did not accord to the Applicant procedural fairness and natural justice.
2. The Judge erred in not considering that *findings of fraud and deception is* [sic] *necessary* to attract PIC4020 pursuant to the case of *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42.
3. That the judge erred in dismissing the applicant’s review application by relying on *hearsay evidence* obtained by the department from a third party which evidence was not tested and put to the applicant.
4. That the Judge failed to consider that each case has its own facts and merits and ought to be considered separately and not as a group.
5. That the judge erred in coming to the conclusion at paragraph 26 of the Judgment that the reasoning adopted by the Tribunal was reasonable which clearly no opportunity was given to the applicant to present his case.
6. That the Judge erred in dismissing the review without considering the case of *Sharma v Minister for Immigration, Multicultural Affairs and Citizenship* [2014] FCCA 2821 which was submitted by the Applicant to the Tribunal.
7. That the Judge erred in dismissing the applicant’s application without considering that PIC 4020 was invoked arbitrarily without any basis in law and fact.
8. The appellant’s application clearly raises an arguable case.

### Is leave to raise some or all of these grounds required?

The Minister submitted that none of these grounds were raised before the primary judge. The Minister cited *Hossam v Minister for Immigration and Border Protection* [2016] FCA 1161 at [46] and *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588 (*VUAX*) at [48] in support of his submission that leave to raise these issues in this appeal should be refused because they lacked sufficient merit and no explanation had been given for the failure to raise them before the primary judge.

Mr Singh’s grounds before the primary judge clearly did not include grounds 2, 3, 4, 6, 7 and 8. Although he might be said to have raised in the FCCA a ground or grounds resembling grounds 1 and 5, Mr Singh did not in terms raise either of the suggested grounds

before her Honour. I accept, therefore, that Mr Singh requires leave to raise all the grounds now sought to be relied on in this appeal.

48        48        The general rule is that the parties are bound by the way they conduct their case, although an appellate court has a discretion to permit an appellant to raise an issue on appeal that was not argued below where the court considers that it is expedient and in the interests of justice to do so. If, however, a point has no merit, then it cannot pass this test. As the Court said in *VUAX* at [48]:

The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused.

49        49        In this case, none of the grounds in Mr Singh’s notice of appeal has sufficient merit to justify the grant of leave.

### **Parties’ submissions**

#### ***Ground 1 and 5***

50        50        Mr Singh made no submissions in support of ground 1 – that the primary judge “failed to consider that the Tribunal did not accord [him] procedural fairness and natural justice” – or ground 5 – that the primary judge “erred in coming to the conclusion at paragraph 26 of the Judgment that the reasoning adopted by the Tribunal was reasonable which [sic] clearly no opportunity was given to [him] to present his case”.

51        51        The Minister submitted that it was open to the Tribunal to determine the merits review on the papers, that it was reasonable for it to do so, and that there was no error in the primary judge finding that to be the case. The Minister referred in this regard to *SZOPV v Minister for Immigration and Border Protection* [2016] FCA 514, where the Court found that it was reasonable for the Tribunal to proceed to make a decision on the papers under s 426A of the *Migration Act* after sending a review applicant a hearing invitation and two text message reminders of the scheduled hearing.

52        52        The Minister further submitted that the primary judge was correct to find that there was nothing on the Tribunal’s file to indicate that Mr Singh had requested an extension of time to provide further material and that he had been given ample opportunity to provide evidence to the Department and the Tribunal.

**Grounds 2, 3, 4, 6, 7 and 8**

53 53 Mr Singh initially made no submissions relevant to grounds 2, 3, 4, 6 and 7. At no stage did he make submissions in support of ground 8.

54 54 At a hearing on 17 February 2017, however, the Court ordered, amongst other things, that the Minister file and serve submissions about:

- (a) Any deficiency in the assessment authority specifications in Schedule 1A to IMMI 12/068 in relation to the occupation of Motor Mechanic;
- (b) The effect, if any, of any such deficiency on the appellant's claim to relief; and
- (c) The application of PIC 4020 to the appellant.

The appellant was also given an opportunity to file and serve written submissions in response to the Minister's supplementary submissions, and on any other matter he sought to argue.

55 55 Mr Singh took advantage of this opportunity to file short submissions. Referring to *Singh v Minister for Immigration* [2012] FMCA 145 (***Singh FMC***), Mr Singh submitted that, contrary to the Minister's submissions (see below), the decision of the Tribunal involved jurisdictional error because of the deficiency in IMMI 12/068 noted at [32] above. Mr Singh submitted that, applying that case, the Court should hold that PIC 4020 had not been enlivened because of the deficiency in IMMI 12/068.

56 56 In relation to grounds 2, 3, 4, 6 and 7, the Minister submitted in writing that the Tribunal's findings were open to it on the material before it. The Minister contended that the Tribunal considered Mr Singh's claims in detail and was ultimately satisfied that the material before it established that a bogus document had been given to the Minister. The Minister submitted that, in so finding, the Tribunal placed significant weight on the statement given by the owner of Coburg Automatic to the Australian Federal Police, and that the weight to be given to Mr Singh's claims and the evidence was a matter for the Tribunal to assess as part of its fact-finding function (referring to *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 281-282).

57 57 Referring to *Kaur v Minister for Immigration and Border Protection* [2014] FCA 281 at [20], [21], [49] and [50], the Minister also submitted that the Tribunal considered *Sharma v Minister* [2014] FCCA 2821 and correctly found that this case was of no significance in determining whether Mr Singh's skills assessment was a "bogus document". The Minister also submitted that, contrary to Mr Singh's suggestion, the Tribunal had correctly applied



*Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42; 220 FCR 169 (*Trivedi*) in determining that he had provided a bogus document.

58        In supplementary written submissions, the Minister accepted that, without a definition of “recognised countries”, IMMI 12/068 failed to specify an assessing authority for motor mechanics. The Minister submitted, however, that the deficiency did not involve jurisdictional error in the Tribunal’s decision, or error on the part of the primary judge. The Minister contended that the Tribunal’s conclusion that PIC 4020 had not been complied with was “a free-standing and independent basis for its decision”. The Minister submitted that there was no requirement that the contents of a bogus document must be material to another condition of the grant of the visa for which the application was made, referring to *Mudiyanselage* and *Arora v Minister for Immigration and Border Protection* [2016] FCAFC 35; 238 FCR 153 (*Arora*). Citing *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 235 ALR 609, especially at [28]-[29], the Minister submitted that there was no relevant error in the primary judge’s judgment. The Minister submitted that:

[T]he deficiency in IMMI 12/068, while regrettable, does not impact upon the correctness of the Tribunal’s decision or the Circuit Court’s dismissal of his application for judicial review. Once the Tribunal had concluded that it was not satisfied (on the basis of the TRA skills assessment) that there was no evidence that Mr Singh had given a bogus document to the Department (PIC 4020(1)), it was bound by cl 485.224 to affirm the delegate’s visa refusal decision, and there was no basis on which the Court could have concluded that it fell into jurisdictional error in doing so.

59        Further, citing *Kim v Minister for Immigration and Citizenship* [2008] FCAFC 73; 167 FCR 578 at [23], the Minister submitted that the three-year bar imposed by PIC 4020 runs from the date of the delegate’s decision to refuse to grant the visa, which was 21 September 2012 in Mr Singh’s case, and would not now “in itself present an impediment to a further visa application by Mr Singh”.

## **Consideration**

### ***Grounds 1 and 5***

60        The proposition advanced in ground 1 of Mr Singh’s notice of appeal that the primary judge failed to consider that the Tribunal did not accord him procedural fairness and natural justice, is not tenable.

61        The primary judge considered the procedures followed by the Tribunal at [25] of her Honour’s reasons for judgment, stating that:

The Tribunal invited the Applicant to appear before it to give evidence and present arguments in accordance with s.360 of the Act. The invitation was sent to the Applicant by one of the methods specified in s.379A of the Act, namely prepaid post to the last address for service provided in connection with the review. Given the totality of actions undertaken by the Tribunal, it had a discretion to proceed to make a determination on the papers pursuant to s.362B of the Act and appropriately exercised that discretion.

62      62      There was no error in her Honour's approach. Further, there is no merit in grounds 1 and 5 of Mr Singh's notice of appeal.

63      63      The requirements of procedural fairness and natural justice are substantially governed in this instance by the governing legislation. As indicated above, in Mr Singh's case, the Tribunal proceeded to make a decision on the review under s 362B of the *Migration Act*. Section 362B applies "if the applicant... is invited under section 360 to appear before the Tribunal; but ... does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear": s 362B(1). The provision enables the Tribunal to "make a decision on the review without taking any further action to allow or enable the applicant to appear before it".

64      64      It is clear that, in the circumstances of the case, it was open to the Tribunal to exercise its discretion to make a decision on the material before it, pursuant to s 362B.

65      65      Mr Singh had been invited to appear before the Tribunal under s 360 of the *Migration Act*. This invitation had been made by letter dated 10 November 2014, inviting Mr Singh to appear before it to give evidence and present arguments relating to the issues in his case. Furthermore, the letter complied with other relevant legislative requirements. It gave Mr Singh notice of the day, time and place of the scheduled hearing in accordance with s 360A(1). It was sent to Mr Singh by one of the methods specified in s 379A, namely by prepaid post to the last address for service provided in connection with the review: see ss 360A(2)(a) and 379A(4). It met the requirements for notice in s 360A(4): see ss 360A(4) and 379C(4)(a); reg 4.21(4)(b)(i). Mr Singh did not appear before the Tribunal at the scheduled hearing. The letter contained a statement to the effect of s 362B: see s 360A(5).

66      66      In determining to proceed under s 362B of the *Migration Act*, the Tribunal not only had regard to this circumstance but also to the history of its correspondence with Mr Singh, including that two SMS messages reminding him about the hearing had been sent to him, and the receipt of his emails on 12 December 2014 prior to the hearing and on 15 December 2014 on the day fixed for the hearing but after its appointed time. In this context, the Tribunal also

considered its letter of 22 December 2014 sent to Mr Singh pursuant to s 359A and to which Mr Singh made no response.

67 In the circumstances, it was not unreasonable for the Tribunal to exercise its discretion under s 362B, to proceed to make a decision on the material before it. Its reasons disclose that it had an evident justification to proceed in this way. No error is shown in its decision to exercise its discretion under s 362B of the *Migration Act*.

68 Further, no error has been shown in the primary judge's statement (at [22]) that "there was nothing on the Tribunal's file nor before the Tribunal or Court to indicate that the Applicant requested an extension of time from the Tribunal for the purposes of providing further material". As her Honour observed, "the emails sent by the Applicant to the Tribunal of 12 and 15 December 2015 did not contain any request for further time. On the evidence, it is clear that the Applicant was given ample opportunity to provide evidence and further evidence to the Tribunal and, indeed, did provide further evidence on more than one occasion" (at [22]).

69 It may also be noted that, on 1 July 2014, Mr Singh requested an extension of time to respond to the Tribunal's invitation to comment dated 5 June 2014 in order to allow for his freedom of information application to be processed. On 2 July 2014 the Tribunal granted that request for an extension of time and, on 25 July 2014, Mr Singh responded to the Tribunal's invitation to comment.

70 For the reasons set out above, to the extent that the proposition in ground 5 of Mr Singh's notice of appeal challenges the Tribunal's decision to proceed under s 362B, that too is not tenable.

71 If (contrary to my view) Mr Singh did not require leave to raise grounds 1 and 5, then for the reasons stated, both grounds of appeal would, in any event, fail.

## ***Ground 2***

72 Ground 2 – that the primary judge "erred in not considering that *findings of fraud and deception* is [sic] *necessary* to attract PIC4020 pursuant to the case of *Trivedi*" is not maintainable. In *Trivedi*, the visa applicant argued that PIC 4020 was not engaged because the Tribunal had not made a finding that she was aware of the deceptive character of the information furnished to the Department. The Court held that PIC 4020(1) refers to information that is false, in the sense of purposely untrue, but its application does not require

the visa applicant to be aware that information that the visa applicant provided was purposely untrue (at [21] and [54]). In this case, the Tribunal found that Mr Singh had caused a bogus document to be given to an officer in relation to his application for the visa. This was because it found the skills assessment issued by TRA on 29 July 2008 was a bogus document since it was obtained on the basis of false statements in Mr Singh's work reference regarding his place of work and the hours he worked. It will be recalled that the Tribunal also found that Mr Singh provided this skills assessment to a Departmental officer on 20 May 2009. Applying *Trivedi*, these findings were clearly sufficient to engage PIC 4020(1) in Mr Singh's case. *Trivedi* was approved by the Full Court of this Court in *Arora* at [11]: see also the discussion below.

73        73        Accordingly, Ground 2 is without merit.

### **Ground 3**

74        74        Ground 3, that the primary judge erred in dismissing Mr Singh's review application by relying on hearsay evidence obtained by the Department from a third party which evidence was not tested and put to him, is also untenable. At the time of the Tribunal's decision, s 353(2) of the *Migration Act* provided that the Tribunal, in reviewing a decision, "is not bound by technicalities, legal forms or rules of evidence" and it "shall act according to substantial justice and the merits of the case". Moreover, as already stated, it was open to the Tribunal in this case to proceed to make a decision under s 362B of the *Migration Act*, "without taking any further action to allow or enable the applicant to appear before it". The effect of these provisions was that the Tribunal was able to rely on the material obtained in the course of the Department's investigation, whether or not properly characterised as hearsay in a court and whether or not tested and put to the visa applicant, providing the Tribunal acted in accordance with other applicable legislative requirements and its decision did not otherwise involve jurisdictional error: compare *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 52; 243 FCR 220 at [8]-[15], [19], [21] (Logan J), [34]-[45], [58], [86], [96] (Flick and Rangiah JJ). Accordingly, this ground has no tenable basis.

### **Ground 4**

75        75        Ground 4, that the primary judge "failed to consider that each case has its own facts and merits and ought to be considered separately and not as a group", is misconceived. The Tribunal clearly addressed Mr Singh's case apart from any other case when it acknowledged that the "central evidentiary issue" was whether it reasonably suspected that the TRA skills

assessment for Mr Singh was a document obtained because of false or misleading statements regarding Mr Singh's work at Coburg Automatic. The fact that some of the material on which the Tribunal relied in determining the issue included statements originally made in relation to criminal proceedings in which Mr Singh was not involved does not detract from the separate and distinct inquiry made by the Tribunal in reviewing the delegate's decision not to grant the visa to Mr Singh. The reasons for judgment of the primary judge show that her Honour considered the Tribunal's decision, together with Mr Singh's claims and submissions, to determine whether jurisdictional error was disclosed in the Tribunal's decision in his case. There is no tenable basis for this ground.

76        76        Mr Singh relied on the FCCA decision in *Sharma v Minister for Immigration and Border Protection* [2015] FCCA 2669 (***Sharma v Minister* [2015] FCCA 2669**). *Sharma v Minister* [2015] FCCA 2669 does not, however, support Mr Singh's case. In that case the FCCA held that the Tribunal's decision under consideration was affected by jurisdictional error in that it was "in all the circumstances, otherwise unreasonable" since the Tribunal failed "to engage in an active intellectual process of considering the applicant's evidence and [to] give reasons for its failure to be satisfied that PIC 4020(1) should be waived" (at [47]). The basis for the FCCA's decision in *Sharma v Minister* [2015] FCCA 2669 was that the Tribunal in that case "appear[ed] to have done no more than recite the evidence before it and the documents to which it had regard. The [Tribunal] then stated that it was not satisfied that the applicant's circumstances amounted to compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen or permanent resident" (at [44]). It is clear that this cannot be said of the Tribunal's consideration in Mr Singh's case of whether the requirements of PIC 4020(1) should be waived, or of its consideration of Mr Singh's claims and submissions more broadly.

### **Ground 6**

77        77        Ground 6, that the primary judge erred in dismissing the review without considering the case of *Sharma v Minister* [2014] FCCA 2821, is without merit. As noted above, the Tribunal specifically considered the decision of the Federal Circuit Court in that case and contrasted it with the decisions in *Batra FMC* and *Mudiyansele*. In these later cases it was specifically held that a document does not cease to be a bogus document solely because the TRA is not validly specified at the time the document was obtained.

- 78      78      An appeal from the judgment in *Batra FMC* was dismissed by this Court. In *Batra FCA*, Murphy J held (at [60]) that a skills assessment by TRA was a bogus document within the meaning of s 97(c) of the *Migration Act* since it was obtained because of a false work reference and that it was immaterial that the skills assessment was of no legal effect (as the TRA had not been validly specified as the assessing authority at the relevant time).
- 79      79      The Tribunal also considered this Court's decision in *Mudiyanselage*, where Tracey J held that the mere submission of a bogus document is sufficient to attract the operation of PIC 4020, regardless of its contents (at [30]-[31] and [35]). *Batra FCA* and *Mudiyanselage* have been followed in subsequent decisions of this Court: see, eg, *Nanre v Minister for Immigration and Border Protection* [2015] FCA 528; 232 FCR 80; and *Minister for Immigration and Border Protection v Sandhu* [2016] FCA 130. *Mudiyanselage* was clearly approved by the Full Court in *Arora*, discussed below.
- 80      80      As indicated above, the Court also sought submissions in this appeal on whether there was a deficiency in IMMI 12/068 in relation to the occupation of Motor Mechanic and its effect, if any, on Mr Singh's case.
- 81      81      The terms of IMMI 12/068, particularly the absence of a definition of "recognised countries", indicate, and the history of the instrument set out above confirms, that, as the Minister accepted, IMMI 12/068 failed to specify TRA as an assessing authority for motor mechanics. TRA was not "a" or "the" "relevant assessing authority" for the purposes of cl 485.214 or 485.221.
- 82      82      For the reasons stated below, however, I reject Mr Singh's contention that PIC 4020 was not engaged because of the deficiency in IMMI 12/068.
- 83      83      As explained above, PIC 4020 applied in Mr Singh's case. To qualify for the grant of a subclass 485 visa, Mr Singh had to satisfy PIC 4020(1). Relevantly in this case, this criterion was not met if the Tribunal was not satisfied that there was no evidence that Mr Singh had caused to be given a bogus document to an officer in relation to the application for the visa. As already noted, the Tribunal held that it reasonably suspected that the skills assessment issued by TRA on 29 July 2008 in respect of Mr Singh was obtained "because of a false or misleading statement in the work reference for Mr Singh". It was on this basis that it found that the skills assessment was a "bogus document" as defined in s 97(c) of the *Migration Act*, which Mr Singh caused to be given to an officer on 20 May 2009 in relation to

his visa application. This was the basis for its decision to affirm the delegate's decision not to grant Mr Singh the visa. None of the findings on which the Tribunal's decision depended were affected by the failure in IMMI 12/068 to specify TRA or any other body as an assessing authority for motor mechanics. The effect of paragraph (c) of the definition of "bogus document" in s 97 of the *Migration Act* as it stood at the relevant time was that if the Tribunal reasonably suspected that the skills assessment was obtained because of a "false or misleading statement" then it was a bogus document. The Tribunal's finding that Mr Singh caused the document to be given to an officer in relation to his visa application was therefore sufficient to engage PIC 4020(1).

84       84       *Singh FMC*, which related to "information", does not assist Mr Singh in the present case, which relates to "a bogus document". *Singh FMC* could only assist Mr Singh in this appeal if the words "in a material particular" in PIC 4020(1) related to both "a bogus document" and "information that is false or misleading". This proposition was rejected by Tracey J in *Mudiyanselage*.

85       85       The skills assessment with which *Mudiyanselage* was concerned was made at a time when TRA had not been appointed a relevant assessing authority by the responsible Minister as required by reg 2.26B(1A) of the *Regulations*. Like Mr Singh in this case, the appellant in *Mudiyanselage* also relied on *Singh FMC*. In the latter case, Driver FM held that, whilst the Tribunal found that the visa applicant had given false information about his employment in his visa application, this information was not false or misleading in a material particular because there was no relevant assessing authority that had been approved or specified for the purpose of the relevant visa criteria. In *Mudiyanselage* it was argued that the submission of the bogus document in that case could not be regarded as material for the purpose of the visa application made in that case. This argument depended on acceptance of the proposition that the words "in a material particular" in PIC 4020(1) related to both "a bogus document" and "information that is false or misleading". Tracey J, in *Mudiyanselage* at [28], rejected that construction of PIC 4020(1), for reasons that I would respectfully adopt.

86       86       Tracey J explained (at [28]-[31]) that:

I have been persuaded, by the Minister's submissions, that the construction for which the appellant contends cannot be accepted. In the first place it would require PIC4020(1) to be read in an ungrammatical fashion: "a bogus document ... in a material particular ..." or "a bogus document ... that is false or misleading in a material particular." The former rendition is plainly ungrammatical. The second is less obviously so. Nonetheless, it may be thought inapt to speak of a document being

false or misleading. That which may be false or misleading will be the contents of the document, not the document itself.

Secondly, the use of the disjunctive “or” suggests the existence of two separate ways in which an applicant may be found to have failed to meet the relevant criteria: either by submitting a bogus document *or* by providing information that is false or misleading in a material particular.

It is also significant that PIC4020(5) contains a definition of information which is to be regarded as false or misleading in a material particular while the term “bogus document” is separately defined in s 97 of the Act and then picked up by the *Migration Regulations*. The concept of materiality plays no part in the latter definition. Were PIC4020(1) to be read in the manner for which the appellant contends it would add this qualification to the statutory definition of “bogus document”. The qualification would have the potential to narrow the scope of the defined term. A document may, for example, be a bogus document because it is a counterfeit notwithstanding the fact that its contents are true and correct in every particular. Similarly, a document may be bogus because it has been altered by the insertion of some immaterial information by a person not authorised to amend the document. In either case there would be a bogus document but, because it did not contain information that was false or misleading in a material particular, the public interest criterion prescribed by PIC4020 would, nonetheless, be satisfied. The existence of the separate definitions of words and phrases appearing in PIC4020 tends strongly against a reading of PIC4020 which would deny those definitions their full force and effect.

The construction contended for the appellant strains the language of PIC4020. That contended for by the Minister does not: it flows from the ordinary and natural meaning of the text. PIC4020 is engaged if an applicant gives to a relevant entity either a bogus document or information that is false or misleading in a material particular when applying for a visa. The mere submission of a bogus document as defined in s 97 of the Act is sufficient to attract the operation of PIC4020(1) regardless of the contents of such a document.

(Emphasis in original.)

As his Honour also noted (at [34]-[35]), this construction was also supported by the terms of the explanatory accompanying the promulgation of the *Amending Regulations* in 2011.

87      87      Tracey J did not in *Mudiyanselage* decide that *Singh FMC* was wrongly decided, noting that it was unnecessary to do so because *Singh FMC* related to information and not a bogus document and was distinguishable on that basis. The present case is also concerned with a bogus document, rather than with information, and *Singh FMC* is also distinguishable from it.

88      88      *Mudiyanselage* was approved by the Full Court of this Court in *Arora* at [16] and [20]-[23]. Furthermore, the decision of the Full Court in *Arora* confirms (at [15]-[17]) that, in the context of PIC 4020(1), it is immaterial whether the falsity of the bogus document bears on any of the other visa criteria that govern the outcome of the relevant visa application. Addressing a definition of “bogus document” in s 5 that was materially the same as that in



s 97, Buchanan, Perram and Rangiah JJ stated (at [15]) that “[p]roperly construed there is no requirement in PIC 4020(1) that the falsity of a bogus document should be relevant to the criteria that the Minister is considering”, noting that the definition of bogus document “is not concerned with the truth or otherwise of statements but with the reliability of documentation”.

89 89 For the above reasons, the Minister’s submission that the Tribunal’s conclusion that Mr Singh did not meet the criterion in PIC 4020(1) was a free-standing and independent basis for its decision must be accepted, notwithstanding the deficiency in IMMI 12/068. There was therefore no basis on which it might be said that there was appellable error in the judgment of the primary judge dismissing Mr Singh’s judicial review application.

### **Ground 7**

90 90 Ground 7, that the primary judge erred in dismissing Mr Singh’s application “without considering that PIC 4020 was invoked arbitrarily without any basis in law and fact”, is also without merit. The Tribunal’s conclusion that PIC 4020 was engaged in Mr Singh’s case was reached after a careful consideration of the material before it, upon a correct application of the governing legislative regime and findings derived from the material before it. There is no appellable error in the primary judge’s conclusion that the findings made by the Tribunal were open to it on the material before it.

### **Ground 8**

91 91 Ground 8, that the appellant’s application clearly raises an arguable case, is misconceived. Where a case comes before the FCCA on a show cause application under r 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth), that Court will consider whether the applicant’s case raises “an arguable case for the relief claimed”. Mr Singh’s judicial review application was not heard on a show cause application and was not therefore decided on this basis.

### **Disposition**

92 92 For the foregoing reasons, leave to rely on grounds 1 to 8 of the notice of appeal should be refused and the appeal should be dismissed.

93 93 In these circumstances, Mr Singh should pay the first respondent’s costs of the proceeding in this Court, save for the costs attributable to the issue of the existence and effect of the deficiency in IMMI 12/068. An order has already been made that there be no order as

to the costs of the directions hearing on 17 February 2017. As explained below, subject to anything the appellant might wish to raise as to the amount of costs to be fixed, the appellant should pay the first respondent's costs fixed in the amount of \$3,200.

94        94        The Minister filed an affidavit affirmed by Ms Ashlee Louise Briffa on 31 March 2017 in support of an application for costs fixed in the amount of \$3,200 in the event that the appeal was dismissed. This amount was said by Ms Briffa to represent approximately 75% of the costs quantum incurred in the matter not referable to the deficiency in IMMI 12/068 or the directions hearing on 17 February 2017. Again, subject to anything the appellant might wish to raise, the amount of \$3,200 is, in my view, a reasonable figure in all the circumstances and it is appropriate in all the circumstances to fix costs, rather than proceed to taxation or to rely on some other process.

95

I certify that the preceding ninety-four (94) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny.

Associate:

Dated:        10 May 2017